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No. 99-1848

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SUPREME COURT OF THE UNITED STATES

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BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF FRIENDS OF THE EARTH, SIERRA CLUB, CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, and AMERICAN CANOE ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI [1/]

This is an action brought under the Fair Housing Amendments Act of 1988, 42 U.S.C. 3601, *et seq*., and Titles II and III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132 and 12182, challenging self-preservation regulations of the respondents. These regulations required that all residents of Residential Board and Care Homes be capable of evacuating the home, without prompting, in the event of an imminent danger. The action became moot when the West Virginia legislature repealed the self-preservation regulations at issue. Petitioners filed a request for attorneys' fees under the "catalyst rule,"[2/] which was denied based on the Court of Appeals for the Fourth Circuit's *en banc* decision in *S-1 & S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.), certiorari denied, 513 U.S. 876 (1994).

Petitioners argue that even though they did not receive a judicial judgment they are entitled to attorneys' fees if they are found to be the "catalyst" that led the West Virginia legislature to take the action to repeal the regulations that they challenged. Numerous courts of appeals have recognized this theory as a basis for plaintiffs to obtain attorneys' fees in cases under fee- shifting statutes when a defendants' voluntary action gives the plaintiffs the remedy they sought prior to a judgment or a settlement. However, the Court of Appeals for the Fourth Circuit has interpreted a ruling of this Court, *Farrar v. Hobby*, 506 U.S. 103 (1992),

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[1/] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation or submission of this brief.

[2/] The petitioners also sought attorneys' fees under the bad faith exception to the American Rule. The district court denied this request, finding that the defendants had not acted in bad faith. Petitioners did not appeal this ruling.

to hold that this theory for recovery of attorneys' fees no longer exists.

Most of the federal environmental laws enacted since 1970 have citizen suit provisions. *See, e.g.*, Clean Air Act, 42 U.S.C. 7604; Clean Water Act, 33 U.S.C. 1365; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972. Since the enactment of citizen suit provisions, the fee-shifting provisions in these statutes have been the basis for bringing thousands of environmental cases. *Amici* are public interest environmental organizations who have brought many of these cases and they intend to bring similar cases in the future. *Amici* include the petitioners in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.167, 120 S. Ct. 693 (2000), where this Court granted certiorari on the very same issue but did not resolve it in its decision. Since the *Laidlaw* case is still pending, and since *amici* continue to litigate similar environmental cases, this issue is of great importance to them.

SUMMARY OF ARGUMENT

1. This Court has repeatedly stated that plaintiffs who obtain relief under fee-shifting statutes because of the actions of the defendant without a judgment or settlement are entitled to attorneys' fees. *Hanrahan v. Hampton*, 446 U.S. 754 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); *Hewitt v. Helms*, 482 U.S. 755 (1987); *Gwaltney v. Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). In *Hewitt*, the Court stated that, "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award * * *." *Id.* at 760.

The Court below held that *Farrar v. Hobby*, 506 U.S.

103 (1992), overruled the catalyst rule. In *Farrar*, this Court stated that the "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement." *Id.* at 111. However, the Court gave no indication that it was overruling its earlier decisions. On the contrary, it cited and relied on its earlier decisions. Subsequently, in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693, 711 (2000), the Court expressly stated that the catalyst rule "was not presented for this Court's decision in *Farrar*." All the other courts of appeals which have considered the effect of *Farrar* on the catalyst rule have held that the catalyst rule continues to apply.

2. Congress has made clear in the legislative history of several fee-shifting statutes that plaintiffs can obtain attorneys' fees under the catalyst rule. Thus, the Senate Report concerning the Civil Rights Attorney's Fees Awards Act of 1976, stated that, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*" (emphasis added). S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).

3. The abolition of the catalyst rule would seriously undermine Congress' intent in passing fee-shifting statutes to encourage litigation to enforce these statutes. Plaintiffs' attorneys are accustomed to evaluating the strengths of their cases before bringing litigation to determine their likelihood of success. Therefore, plaintiffs' attorneys can choose to take the risk that the courts will decide against them and therefore no fees will be paid them. However, it is entirely a different matter for fees to be denied because plaintiffs'

arguments are so strong that the defendant provides the relief without even the need for a judgment. Litigants will have great difficulty in obtaining counsel if attorneys can be denied fees precisely because of the success of the litigation. This is particularly true if this can occur after the litigation has run for years and the attorneys have expended a large number of hours of work and incurred substantial expenses.

ARGUMENT

The question before this Court is a relatively simple one that has been addressed many times by numerous federal courts under the more than 100 fee-shifting statutes found in federal law. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (appendix listing federal statutes authorizing the award of attorney's fees). The issue is whether a plaintiff is a "prevailing party" where it has obtained a favorable result not through a judgment of the court or a settlement but because the defendant takes action, at least in part, because of the litigation. This issue is what is commonly referred to as the "catalyst rule" or "catalyst theory."

I

DECISIONS OF THE COURT DIRECTLY SUPPORT THE APPLICABILITY OF THE CATALYST RULE

This Court has addressed this question on numerous occasions. In *Hanrahan v. Hampton*, 446 U.S. 754, 756-757 (1980), the Court held that civil rights plaintiffs who had prevailed on appeal and thereby won the right to a new trial but had not yet received any relief from the district court were not "prevailing parties" under 42 U.S.C 1988 for the purpose of obtaining attorneys' fees. However, the Court, after reviewing the legislative history of 42 U.S.C. 1988, explained that "a person may in some circumstances be a

'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'"

The Court further articulated the catalyst rule in *Maher v. Gagne*, 448 U.S. 122, 129 (1980). In holding that a settlement was adequate to confer prevailing party status, the Court quoted a Senate report that stated that, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights * * * without formally obtaining relief." *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).

Later, in *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987), this Court, in addressing the definition of a prevailing party, issued its clearest statement of the catalyst rule:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*, * * * a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. *See Maher*, *supra*, 448 U.S., at 129 * * *.

The Court went on to say that "in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. *That* is the proper equivalent of a judicial judgment which would produce the same effect * * *" (emphasis in original).

Id. at 761.[3/]

This Court again addressed this issue in *Gwaltney v. Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 67, n. 6 (1987):[4/]

> Under the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the district courts to award litigation costs "whenever the court determines such award is appropriate." 33 U.S.C. 1365(d). The legislative history of this provision states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 414, p. 81 (1971), 2 Leg. Hist. 1499.[5/]

[3/] The plaintiff in *Hewitt* was denied fees because the changes in prison policies did not benefit him since he was no longer in custody. 482 U.S. at 763. However, here, since plaintiffs continue to operate and reside in the residential care facilities, they benefit from the amended regulation. In any event, the question before this Court is whether plaintiffs *can* be prevailing parties without having obtained an enforceable judgment or settlement, not whether they actually are prevailing parties. The issue of whether plaintiffs can satisfy the requirements of the catalyst rule is properly a question for the district court in the first instance on remand. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.167, 120 S. Ct. 693, 712 (2000).

[4/] In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-560 (1986), the Court stated that the principles to be followed in awarding attorneys' fees and expenses are the same for environmental and civil rights cases.

[5/] In *Laidlaw v. Friends of the Earth*, 149 F.3d 303 (4th Cir. 1998), the Court of Appeals for the Fourth Circuit indicated that it believed that this statement was erroneous because the *Gwaltney* decision discussed the prior

In short, prior to *Farrar*, according to this Court, it was "settled law" that a plaintiff has prevailed for the purposes of fees when, in the absence of a court order or a settlement, a voluntary change in a defendant's conduct as a result of a lawsuit has provided relief. *Hewitt v. Helms, supra*, 482 U.S. at 760-761.

In *S-1 & S-2 v. State Board of Education*, upon which the decision of the court of appeals in this case was based, the Court of Appeals for the Fourth Circuit held that this Court's decision in *Farrar* overruled the catalyst rule. In *Farrar*, the Court considered the issue of "whether a civil rights plaintiff who receives a nominal damages award is a 'prevailing party' eligible to receive attorney's fees under 42 U.S.C. § 1988." 506 U.S. at 105. The Court said that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." *Id.* at 111.[6/] However, the Court went on to say (*ibid.*):

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language of Section 505(d) of the Clean Water Act which authorized a court to award fees to any "party," rather than the language of the 1987 amendment to that Section which added "prevailing or substantially prevailing" before "party." *Id.* at 307, n. 5. However, this Court's statement in *Gwaltney* was not erroneous. The legislative history of the 1987 amendment to Section 505(d) shows that the change in the language of that Section was intended merely to clarify Congress' intent that citizen plaintiffs not receive attorneys' fee awards when the plaintiffs had lost the litigation. S. Rep. No. 50, 99th Cong., 1st Sess. 33 (1985); S. Rep. No. 233, 98th Cong., 1st Sess. 24-25 (1983); A Legislative History of the Water Quality Act of 1987, 100th Cong., 2d Sess., Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312 (remarks of Senator Chafee, the sponsor of the legislation). Since the "prevailing party" language is precisely the language interpreted by the Court in *Hanrahan v. Hampton*, *Maher v. Gagne*, and *Hewitt v. Helms*, the addition of that language cannot possibly mean that the catalyst rule no longer applies to fee awards under Section 505(d).

[6/] The Court found that an award of nominal damages was sufficient to make the plaintiff a prevailing party. However, it held that since a

> The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra,* 482 U.S., at 760, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt, supra,* 482 U.S. at 764. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." [citation omitted] Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. [citation omitted]

The Court of Appeals for the Fourth Circuit held in *S-1 & S-2* that the language, "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement," overruled the catalyst rule because it did not add *or voluntary action by the defendant* at the end of the sentence. 6 F.3d at 168 (dissenting opinion adopted by majority *en banc*). However, *Farrar* was not addressing the situation where a defendant had voluntarily changed its behavior in response to a lawsuit. Instead, it was discussing the nature of the relief that a plaintiff who had obtained a judgment must receive in order to be a prevailing party for fees purposes.

The Court of Appeals for the Fourth Circuit held that *Farrar* overruled the catalyst rule even though *Farrar* did not state that it was doing so. As the Court of Appeals for

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prevailing party is only entitled to reasonable fees, the denial of fees was appropriate when the plaintiff had obtained no significant relief. 506 U.S. at 115.

the Seventh Circuit stated in *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 276 (1994), it is "implausible that the Supreme Court meant to abolish a rule employed by nearly every circuit and previously recognized by the Court itself as 'settled law,' without expressly indicating that it was doing so." Similarly, in *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 547 (3d Cir. 1994), the Court of Appeals for the Third Circuit stated that "[w]e believe it is not likely that the Supreme Court [in *Farrar*] would overturn such a wide-spread theory without even mentioning it, particularly when it was inapplicable to the case at hand." It is particularly doubtful that the Court was overruling its earlier decisions when it explicitly cited and relied on them.

In the case below, the court of appeals stated that, "[b]ecause the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement," they are not prevailing parties. Appendix to Petitioners' Petition for Writ of Certiorari (hereafter "Pet. App."), p. A8. However, when, as here, the defendants modify their behavior in response to litigation (by no longer forcing the residential facility plaintiffs to close or the individual plaintiffs to move out of their homes), the lawsuit has affected the behavior of the defendant toward the plaintiff exactly as *Farrar* requires. Indeed, the Court made clear in *Farrar* that it is not a judgment itself that confers prevailing party status but a change in behavior by the defendant or a change in the legal relationship between the plaintiff and the defendant. *See* 506 U.S. at 111. Similarly, in *Hewitt*, this Court stated that "[a]t the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces–the payment of damages, or some specific performance, or the termination of some conduct." 482 U.S. at 761. Accord, *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (a party who wins a declaratory

judgment prevails for fees purposes only if the judgment "affects the behavior of the defendant toward the plaintiff"). Thus, the *sine qua non* of prevailing party status is not a judgment but a change in behavior by the defendant brought on by the lawsuit. This change of behavior is exactly the situation covered by the catalyst rule.

Ten other Circuits have found, either explicitly or implicitly, that the catalyst rule was not overruled by *Farrar*. *Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236, 240-241 (1st Cir. 1993) (finding plaintiff to be catalyst and remanding the case to the district court for a decision on the amount of fees); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995)("*Farrar* does not eviscerate the long-standing doctrine that a plaintiff who has obtained at least some part of what he sought in bringing the suit may be considered a prevailing party"); *Baumgartner v. Harrisburg Housing Auth.*, *supra*, 21 F.3d at 546-551 (3d Cir. 1994) (quoted at p. 8-9 above); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993)("A more precise reading of *Farrar*, however, might suggest that a party may prevail, even in the absence of a judgment, consent decree, or direct personal benefit 'if its ends are accomplished as a result of the litigation'" (citation omitted)); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-258 (6th Cir. 1993) (holding parties to be prevailing party under the catalyst rule because "it is not necessary that a party actually receive some form of judicially ordered relief" in order to be a prevailing party under §1988); *Zinn by Blankenship v. Shalala, supra*, 35 F.3d at 274-276 (quoted at p. 8 above);[7/] *Little Rock Sch. Dist. v. Pulaski County Special*

[7/] The Eleventh Circuit in a footnote in *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1206-1207, n. 5 (11th Cir. 1999), stated that *Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 89 F.3d 464 (7th Cir. 1996), certiorari denied, 520 U.S. 1198 (1997) in an opinion written by the dissenting judge in *Zinn by Blankenship v. Shalala*, called into question the continued viability of the catalyst rule in the Seventh Circuit. *Amici* disagree with this statement. The court in *Steven L.* held that plaintiffs received only interim relief "for which attorneys' fees may not be awarded." *Id.* at 469. The catalyst rule was irrelevant to that holding. To the extent that the court considered the catalyst rule, it was with regard to the applicability of the catalyst rule to the facts, not the threshold question of the validity of the catalyst rule. *See Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, *supra*, 89 F.3d at 456-469.

Sch. Dist., #1, 17 F.3d 260, 262-263 and n. 2 (8th Cir. 1994)("We decline to extend *Farrar*'s language beyond its context of determining prevailing party status after a final determination on the merits"); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995)("*Farrar* does not preclude a catalyst test"); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994)("we * * * have not agreed [that *Farrar* rendered the catalyst theory nonviable]"); *American Council of the Blind v. Romer*, 992 F.2d 249, 250-251 (10th Cir.), certiorari denied, 510 U.S. 864 (1993) ("It does not appear that the decision in *Farrar* condemns the use of the 'catalyst rule' in a nonjudgment on the merits situation"); *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1206-1207 (11th Cir. 1999) ("The majority of courts that have addressed the question, however, have found that *Farrar*, which does not mention the catalyst test and which did not present a question relating to the form of relief, does not bar the catalyst test. Like the majority of our sister circuit courts which have addressed this issue, * * * we hold that the catalyst test survived *Farrar*"); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (implicitly upholding catalyst test by examining whether plaintiff's actions led to the extrajudicial relief he obtained).

Subsequent to these cases, this Court once again had the opportunity to address this issue. In *Friends of the Earth,*

Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S.167, 120 S. Ct. 693 (2000), this Court stated expressly that the issue of the catalyst rule was not addressed in *Farrar* (*id.* at 711):

> The case involved no catalytic effect. Recognizing that the issue was not presented for this Court's decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory.[8/]

Thus, the court of appeals erroneously relied on *Farrar* as overruling the catalyst rule.[9/]

[8/] The United States Government filed a brief as *Amicus Curiae* in support of the petitioners in *Laidlaw* on this issue. The Government's brief agreed with petitioner's position that the catalyst theory continues to be available to plaintiffs in cases involving fee-shifting statutes. The relevant portions of that *amicus* brief are included in the appendix hereto.

[9/] In Respondent's Brief in Opposition to Petition for a Writ of Certiorari (pp. 16-21), respondents argued that this case was not an inappropriate vehicle to examine the issue of the catalyst rule because the West Virginia Legislature took the action to repeal the "self-preservation"regulations, not the respondents themselves. It is irrelevant that the relief granted here was by the West Virginia legislature. There is nothing in the catalyst rule which turns on the person or entity that took the action to give the plaintiff the relief requested. Consequently, the catalyst rule has been applied where the relief has been provided by a legislative body. *See, e.g. Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236, 241 (1st Cir. 1993) ("The fact that Congress delivered the plaintiffs' requested relief rather than the parties sued, HUD and Corcoran, provides no relevant distinction. Corcoran, HUD, and Congress are manifestations of the same entity, the government. HUD is simply an instrument of Congress' will, and Corcoran does HUD's bidding"); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 917 (3d Cir. 1985) ("When a state agency seeks to reform its procedures through the state legislature and new procedures are enacted, we agree with the district court that 'passage [of the 1976 Act] is properly attributable' to defendants").

II
THE LEGISLATIVE HISTORY OF SEVERAL FEE-SHIFTING STATUTES SUPPORTS THE APPLICABILITY OF THE CATALYST RULE

Congress has clearly indicated its support for the catalyst rule in the legislative history of numerous fee-shifting statutes.

Congress made its position on the catalyst rule clear in the legislative history accompanying Section 304 of the Clean Air Act (42 U.S.C. 7604). The Senate Report stated (S. Rep. No. 1196, 91st Cong., 2d Sess. 38 (1970)):

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

The Senate Report accompanying the Federal Water Pollution Control Act contains identical language in its discussion of the fee-shifting provision of the Act (Section 505, 33 U.S.C. 1365). *See* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1499 (1973).

The legislative history of 42 U.S.C. 1988, the Civil Rights Attorney's Fees Awards Act of 1976, also makes clear the importance of both the fee shifting statutes themselves and the need for the catalyst rule. S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) states:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

The Report further said that "fee awards are essential if the Federal statutes to which [this section] applies are to be fully enforced." *Id.*, p. 5. Then, in a statement directly relevant here, the Senate Report said that, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Ibid.* The House Report on the same Act stated (H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976)):

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. * * * If the litigation terminates by consent decree, for example, it would be proper to award counsel fees [citations omitted]. A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

Congress revisited this issue again when looking at the fee-shifting provisions of the Equal Access to Justice Act, 28 U.S.C. 2412 (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980)):

> Under existing fee-shifting statutes, the definition of

> prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits.

Thus, Congress intended plaintiffs who obtained relief through the action of the defendant without a judgment or settlement to be prevailing parties under fee-shifting statutes.

III
PUBLIC POLICY SUPPORTS THE APPLICABILITY OF THE CATALYST RULE

The decision of the Fourth Circuit that the catalyst rule no longer exists would seriously undermine the effectiveness of fee-shifting statutes in the environmental, civil rights and other fields.

Congress intended fee-shifting statutes to encourage the bringing of litigation under the statutes that contain them. This position was made clear by Congress in the legislative history of the Civil Rights Attorneys' Fees Awards Act. The Senate Report on that Act stated (S. Rep. No. 1011, *supra*, p. 2):

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

The Senate Report further stated (*id.*, p. 3):

> The idea of the "private attorney general" is not a new one, nor are attorneys' fees a new remedy. Congress has

commonly authorized attorneys' fees in laws under which "private attorneys general" play a significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws * * *. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum -Griffin), "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose."

The Senate Report accompanying the Clean Water Act makes clear that the fee-shifting provision of the statute was likewise intended to encourage the bringing of citizen suits. S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971). As a result, the Court of Appeals for the Third Circuit has stated that Congress intended the Clean Water Act to induce attorneys to be willing to bring these cases. *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 1448-1449 (1988). Congress did this by providing for compensation at market rates so that attorneys handling these cases would be compensated, when the litigation was successful, to the same degree as when they did other legal work and would be attracted to continue doing such work in the future. *Ibid.*

Congress again reiterated the importance of fee-shifting statutes when amending 28 U.S.C. 2412 to allow the recovery of fees against the United States under the Equal Access to Justice Act. There, Congress stated (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980)):

> The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to

> discourage or deter litigation. However, in many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process.

This Court has also recognized the importance of fee-shifting provisions in federal statutes. In a case dealing with the fee-shifting provision of the Civil Rights Act of 1964, this Court stated (*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968)):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. * * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees * * * to encourage individuals injured by racial discrimination to seek judicial relief * * *. (footnotes omitted)

See also Evans v. Jeff D., 475 U.S. 717, 741 (1986)(Section 1988 gives "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights").

The catalyst rule carries out Congress' intent. It provides for the payment of attorneys' fees when the case has been successful in providing the plaintiff with all or a substantial portion of the relief requested. It should make no difference whether the relief came through a court judgment,

a settlement or the decision of the defendant to provide redress due to the litigation. As the Court of Appeals for the Third Circuit has stated, "from a policy standpoint, if defendants could deprive plaintiffs of attorney's fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing these civil rights suits, a result inconsistent with Congress' intent in enacting section 1988". *Baumgartner v. Harrisburg Housing Authority*, *supra*, 21 F.3d at 548.[10/]

If the catalyst rule did not exist, attorneys would be extremely leary about bringing litigation under fee-shifting statutes no matter how strong their cases appeared to be. Attorneys are willing to take the risk that their evaluation of the strength of their case is overly optimistic. If this turns out to be true and the case is lost, they bear that risk. However, they cannot bear the risk that they were absolutely correct about the strength of their case and, as a result, the defendant chooses, prior to resolution by the court, to provide the relief requested. In other words, attorneys can bear the risk of losing litigation, but not of winning it.

The abolition of the catalyst rule would be particularly severe since the attorneys may lose their fees and expenses by action of the defendant at any time during the litigation. The case can be litigated for years. If the defendant then

[10/] The Court of Appeals for the Eleventh Circuit in *Morris v. City of West Palm Beach* likewise recently emphasized the importance of the catalyst rule (194 F.3d at 1207):

> The catalyst test creates incentives for plaintiffs to initiate potentially meritorious civil rights cases and for plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought. In light of its long history and the important policies undergirding the catalyst test, we will not extend *Farrar* to eliminate the catalyst test.

moots the case by granting relief, even when the case is on appeal or in this Court, the abolition of the catalyst rule would mean all the fees and expenses would be lost. Few attorneys would be willing or able to take such a risk.

Many of the cases brought under fee-shifting statutes, such as environmental cases, involve major, complex litigation requiring substantial resources. The clients in this type of litigation rarely can pay any significant portion of the fees or costs. Hundreds or thousands of hours and tens or hundreds of thousands of dollars may need to be expended.

The *Laidlaw* case is a good example. *Laidlaw*, a Clean Water Act case against a private polluter, was brought in June 1992. Since the beginning of this case, over eight years ago, plaintiffs' attorneys' have expended approximately 9,000 hours and $230,000 in expenses on this case. While the case was in this Court, the defendant claimed that the case had become moot because the incinerator had been dismantled. This Court remanded the issue of mootness to the lower courts for resolution.[11/] If the case is found moot, and the catalyst rule is abolished, plaintiffs' counsel would be denied fees over eight years after the case was brought.[12/]

[11/] The Court also remanded another issue of mootness relating to the defendant's earlier actions in bringing itself into compliance with its permit.

[12/] *Amici* note that the case is now stayed because Laidlaw (now Safetey-Kleen, Corp.) Has declared bankruptcy.

IV

THE CASE SHOULD BE REMANDED BACK TO THE DISTRICT COURT TO ADDRESS THE FACTUAL ISSUE OF WHETHER PETITIONERS HAVE SATISFIED THE REQUIREMENTS OF THE CATALYST RULE

The district court held that the catalyst rule did not apply in the Fourth Circuit under *S-1 & S-2*. Pet. App. A17. It stated (*ibid.*):

> The "catalyst theory" deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered. Were this argument viable, plaintiffs might prevail on this theory.

It is therefore clear that the district court found that the requirements of the catalyst rule might well have been satisfied if it were applicable in the Fourth Circuit but it did not determine this issue.

In *Laidlaw*, this Court granted a writ of certiorari as to the validity of the catalyst rule. However, in remanding the case for further determinations on the issue of mootness, the Court stated that "[i]t is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." *Friends of the Earth v. Laidlaw Environmental Services, TOC*, *supra*, 120 S. Ct at 712. Similarly, here, the case should be remanded to the district court to determine if the requirements of the catalyst rule have been satisfied.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to hold that plaintiffs in actions arising under fee-shifting statutes can recover attorneys' fees under the catalyst rule and to remand the case to the district court to determine the applicability of the catalyst rule to the facts of this case.

Respectfully submitted,

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APPENDIX

No. 98-822

In the Supreme Court of the United States

FRIENDS OF THE EARTH, INC., ET AL., PETITIONERS

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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D. The Court of Appeals' Judgment Should Be Vacated And The Case Remanded For Further Proceedings, Including Appropriate Proceedings Respecting Petitioners' Entitlement To Litigation Costs

For the foregoing reasons, we submit that the court of appeals erred in concluding that the district court's determination not to award injunctive relief rendered this case moot. If the Court agrees, then there will be no occasion to reach the question whether citizens may recover litigation costs if the citizen action becomes moot as a consequence of the defendant's cessation of its unlawful conduct. Under this Court's normal practice, the case will be remanded for resolution of the remaining issues that the court of appeals did not reach, including the question of petitioners' standing.

The question of attorneys' fees can be addressed once the litigation has run its course. We nevertheless observe that there is good reason to question the court of appeals' dictum that "[petitioners'] failure to obtain relief on the merits of their claim precludes any recovery of attorneys' fees or litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" Pet. App. 9a n.5. This Court indicated in *Gwaltney* that citizens would be entitled to recover litigation costs for suits that "result in successful abatement but do not reach a verdict." 484 U.S. at 67 n.6 (quoting S. Rep. No. 414, 92 Cong., 2d Sess. 81 (1971)). At the time of that suit, Section 505(d) of the Clean Water Act authorized courts to award attorneys' fees "whenever the court determines such award is appropriate." 33 U.S.C. 1365(d) (1982). Congress has since revised Section 505(d) to allow an award of litigation costs "to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. 1365(d). The amendment, which prohibits a court from

awarding fees to a losing party, does not appear to restrict the court's power to award fees to a citizen who can show that the suit prompted the defendant to come into compliance.

The Court has previously indicated, in connection with other federal statutes that authorize "prevailing parties" to recover attorneys' fees, that a plaintiff whose suit induces the defendant to comply with the law voluntarily is a "prevailing party." For example, the Court stated in *Hewitt*, *supra*, a case arising under 42 U.S.C. 1983, that "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under [42 U.S.C.] 1988." 482 U.S. at 760. The Court explained:

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment – *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. when that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id. at 760-761. See also *Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("for purposes of the award of counsel fees [under 42 U.S.C. 1988], parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief")(quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).

The Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), which states that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim," *id.* at 111, does not repudiate the reasoning in *Hewitt* and *Maher*. A plaintiff prevails on the "merits of his claim" if a court finds that the defendant, in direct response to the plaintiff's suit, has altered his behavior in a way that renders the claim moot as a matter of law. See *Hewitt*, 482 U.S. at 761 ("In all civil litigation, the judicial

decree is not the end but the means.").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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